1-5-2016

State v. Harrison Appellant's Brief Dckt. 43299

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. MICHAEL SEAN HARRISON, Defendant-Appellant.	)	NO. 43299 KOOTENAI COUNTY NO. CR 2014-20195 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE LANSING L HAYNES
District Judge

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Nature of the Case

Michael Sean Harrison allowed an officer to empty his pockets while the officer unlawfully detained and pat searched him. The officer found two small rocks of heroin. After the district court denied his motion to suppress that evidence, Mr. Harrison pled guilty to possession of a controlled substance. As part of his guilty plea, he reserved the right to challenge the district court's denial of his motion to suppress on appeal.

The district court erred by denying Mr. Harrison's motion. First, the officer unlawfully stopped and detained Mr. Harrison without reasonable suspicion. Second, the officer unlawfully pat searched Mr. Harrison without reason to believe he was armed and presently dangerous. Third, Mr. Harrison's consent to empty his pockets was invalid because it came during, and was inextricably bound to, the unlawful detention and pat search. Finally, Mr. Harrison's consent was not voluntary. This Court should vacate Mr. Harrison's conviction, reverse the order denying his motion to suppress, and remand to the district court for further proceedings.

Statement of the Facts and Course of Proceedings

The district court made the following findings of fact at the motion to suppress hearing:

> [O]n October 25, 2014, at 5:00 o'clock in the morning . . . or a few minutes after that, Post Falls Police Department Officer Harrison was sent to Wal-Mart out near Stateline on a shoplifting call. He has indicated in his testimony that it is not unusual in his training and his experience for persons involved in shoplifting events to steal some items and conceal them in their pockets and pay for other items on the way out.
>
> And so he was advised that there was—when he arrived at the scene, apparently the parking lot seemed well lit but it wasn't full of vehicles and shoppers in a daylight, middle of the day what one might expect to be the level of foot traffic or car traffic outside of a Wal-Mart. There were some employees outside apparently on a smoke break.
>
> The indication—or the information that Officer Harrison had was that a female person [Mary Morales] had stolen a pair of pants. Had left the store. Was

seated in the passenger side of a black Subaru vehicle. Officer Harrison, in fact, saw that vehicle parked where it was—he was told it would be parked. And observed that woman to be sitting maybe down on the floorboard of the front passenger side, moving in a way that I think can be described as a furtive movement; he was unsure what she was doing.

He almost simultaneously saw the male who was had been [sic] described to him and who now turns out to be Michael Sean Harrison leaving that Wal-Mart store with grocery bags in his hand or merchandise bags in his hand.

Mr. Harrison had been described by the manager from inside the store to dispatch who then described to Officer Harrison that it looked like maybe Mr. Harrison was getting ready to do the old car push, as they call it, load up a cart and then run it out of the store to a waiting car.

But he didn't. He paid for the items that he was brining out in the bags that he had. He was described in a manner that certainly led, reasonably, Officer Harrison to believe that the man approaching the scene, 30 to 35 years old, in his 30s, black hooded sweatshirt and some shorts, was the same man that the manager had been talking about.

The officer certainly did direct Mr. Harrison, Michael Sean Harrison to come toward him and to lay down the merchandise that was in Mr. Harrison [sic] hands. He said so not aggressively, but with some direction to come here and lay your items down. Your stuff down.

Mr. Michael Sean Harrison complied with that. The officer explained to the suspect, Mr. Harrison, that he was there on a shoplifting complaint, I guess, or information about the woman and he himself, Mr. Harrison. Mr. Harrison said he had bought the items that he brought out. Officer Harrison indicated clearly that he was going to make sure that Mr. Harrison had no weapons on him and engaged in a pat search.

During that pat search, the Court could see on Exhibit 1 that Mr. Harrison did become somewhat agitated at the woman that got out of the vehicle that she had been sitting in and was staring at her pretty—I don't know about aggressive—but certainly an unhappy manner that maybe she had engaged in some conduct that got him in a situation where he is getting patted down. And based on that rising level of agitation on the part of Mr. Harrison, Officer Harrison decided to place Mr. Harrison in handcuffs given that circumstance.

The Court heard Officer Harrison inform Mr. Harrison that he was not under arrest, but he was just being detained and really made the comment that "You're being detained until I can figure out what happened." What all had happened at this scene.

He asks Mr. Harrison during the pat-down search is there anything in there that would poke me or stick me or anything like that? And Mr. Harrison said no. He asked what is in your pockets and there was an answer regarding coin or change, I wasn't exactly hearing that, but I accept counsel's representations that it was either coins or change.

Officer Harrison then asked if—and asked Mr. Harrison words to the effect of "Would you mind if I empty your pockets partly to make sure if there's anything stolen in there?" I heard Mr. Harrison answer in the affirmative with the

word "Yeah." Might have been, "Yes" but it sounded like "Yeah." And then certainly the contraband that is the subject of this charge was found.

(1/26/15 Tr., p.47, L.9 – p.51, L.1[1].)

The State charged Mr. Harrison with possession of a controlled substance. (R., pp.19–20, 35–36.) Mr. Harrison filed a motion to suppress the evidence seized against him, arguing that Officer Harrison unlawfully seized, detained, and pat searched him, and that him consent was involuntary. (R., pp.44–58.) The State countered that reasonable suspicion supported the seizure, detention, and pat search, and that Mr. Harrison voluntarily consented to Officer Harrison's request to empty his pockets. (R., pp.62–77.)

The district court denied the motion. (R., p.82.) It held that the stop and detention was supported by reasonable suspicion, it did not need to decide whether the pat search was justified because the pat search did not directly lead to the discovery of evidence, and Mr. Harrison voluntarily consented to Officer Harrison emptying his pockets. (1/26/15 Tr., p.51, L.2 – p.56, L.6.)

Mr. Harrison then entered a conditional guilty plea to possession of a controlled substance, reserving his right to appeal the district court's denial of his motion to suppress. (R., pp.102–05, 107.) The district court sentenced Mr. Harrison to five years, with three years

[1] It is unclear whether the district court considered the preliminary hearing transcript in deciding the motion to suppress. The State cited to the preliminary hearing transcript once in its briefing (R., p.70), but the court and the parties did not otherwise expressly rely on the preliminary hearing transcript (*see* 1/26/15 Tr., p.4, Ls.11–13 (the court stating that it had read the parties' briefing, but not mentioning the preliminary hearing transcript).) It is worth noting, however, one discrepancy between Officer Harrison's testimony at the two hearings. At the preliminary hearing, Officer Harrison testified that Mr. Harrison consented to a pat down search (11/7/14 Tr., p.10, Ls.13–15), while at the suppression hearing he testified that he simply told Mr. Harrison was going to do a pat-search (1/26/15 Tr., p.30, Ls.15–19). As the dash camera video makes clear, Mr. Harrison never consented to a pat search—Officer Harrison simply told him to turn around so he could make sure Mr. Harrison did not have any weapons. (State's Exhibit 1 to 1/26/15 motion to suppress hearing ("Ex. 1"), 5:16:46–5:16:54.)

fixed, and retained jurisdiction. (R., pp.117–19.) Mr. Harrison timely appealed. (R., pp.120–22.) The court has since placed Mr. Harrison on probation. (Judgment on Retained Jurisdiction[2].)

[2] Mr. Harrison attached this document to his motion to augment, which he filed along with this brief.

ISSUE

Did the district court err when it denied Mr. Harrison's motion to suppress?

ARGUMENT

The District Court Erred When It Denied Mr. Harrison's Motion To Suppress

"The standard of review of a suppression motion is bifurcated." *State v. Cutler*, 143 Idaho 297, 302 (Ct. App. 2006). This Court accepts the trial court's findings of fact if they are supported by substantial evidence, but freely reviews the application of constitutional principles to the facts as found. *Id.*

The United States and Idaho Constitutions prohibit unreasonable searches and seizures. U.S. CONST. amend. IV; IDAHO CONST. art. I, § 17. Warrantless searches and seizures are presumptively unreasonable. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Halen v. State*, 136 Idaho 829, 833 (2002). To overcome that presumption, the State has the burden of proving that the search or seizure falls within a well-recognized exception to the warrant requirement and was reasonable in light of the surrounding circumstances. *Schneckloth*, 412 U.S. at 219; *Schmerber v. California*, 384 U.S. 757, 767 (1966) (overruled on other grounds in *Missouri v. McNeely*, 133 S. Ct. 1552, 1555 (2013)); *Halen*, 136 Idaho at 833. If the government fails to meet this burden, the evidence acquired as a result of the illegal search or seizure, including later-discovered evidence derived from the original illegal search, is inadmissible. *Wong Sun v. United States*, 371 U.S. 471, 485 (1963); *State v. Koivu*, 152 Idaho 511, 518–19 (2012).

Officer Harrison's interaction with Mr. Harrison was illegal from beginning to end. First, reasonable suspicion did not support the stop, detention, or pat search. Further, because Mr. Harrison was illegally detained and pat searched when he gave his consent to empty his pockets, that consent was invalid. Finally, even if Mr. Harrison was legally detained and pat

searched, the circumstances surrounding that consent made it involuntarily. The district court erred by denying Mr. Harrison's motion to suppress.

A. Officer Harrison Unlawfully Stopped And Detained Mr. Harrison Without Reasonable Suspicion

To pass muster under the Fourth Amendment, warrantless seizures must generally be based on probable cause. *Florida v. Royer*, 460 U.S. 491, 499–500 (1983). However, limited investigatory detentions are permissible when "justified by an officer's reasonable articulable suspicion that a person has committed, or is about to commit, a crime." *State v. Morgan*, 154 Idaho 109, 112 (2013). "Reasonable suspicion must be based on specific, articulable facts and the rational inferences that can be drawn from those facts. Reasonable suspicion requires more than a mere hunch or inchoate and unparticularized suspicion. The test for reasonable suspicion is based on the totality of the circumstances known to the officer at or before the time of the stop." *Id.* (internal citations and quotations omitted).

The district court found that Mr. Harrison was detained,[3] and that probable cause supported the detention. (1/26/15 Tr., p.51, Ls.2–18.) The court explained that an officer *does not* have "to articulate specific facts with respect to each individual, that he suspects each individual has committed an offense." (1/26/15 Tr., p.51, Ls.15–18.) Instead, the court appears to have found sufficient reasonable suspicion that Mr. Harrison had something to do with Ms. Morales's crime:

[3] The State also conceded this point. (R., pp.62–73.) As argued by defense counsel below, Officer Harrison detained Mr. Harrison when he said "step over here," "set your stuff down," and "turn around for me" and "I'm going to make sure you don't have any weapons." (*See* R., pp.51–52 (citing *State v. Cardenas*, 143 Idaho 903, 908 (Ct. App. 2006) ("When the deputy told Cardenas "he needed to come speak to [the deputy]," under the circumstances, Cardenas was seized."); *see also* Ex., 5:16:32–5:16:52; 1/26/15 Tr., p.30, Ls.1–19.)

> [T]he information that he had was that the crime had been committed; the theft of a pair of pants. That Mr. Harrison and the woman had been together in the store at the place where the crime was committed, and were coming to the same location where the woman and been found seated in the car that—in other words, to Officer Harrison had a reasonable and articulable suspicion to believe that these people had been involved in the theft. Notwithstanding the fact that he was advised that Mr. Harrison had paid for the items that he was carrying out in the bags to that car.
>
> *It doesn't have to—there doesn't have to be reasonable and articulable suspicion that Mr. Harrison had, in fact, committed an offense but that he was involved with someone who had. Did he know something about it? Was he aiding and abetting in it? Did he have information about it?* The status quo needed to be maintained while that preliminary investigation into that shoplifting event was conducted.
>
> And the Court finds that there were reasonable and articulable suspicions to support Officer Harrison detaining Mr. Harrison. It was reasonable for Officer Harrison to handcuff Mr. Harrison, given the little bit of the rising agitation that Mr. Harrison had. . . .

(1/26/15 Tr., p.51, L.19 – p.52, L.15 (emphasis added).)

Contrary to the district court's conclusion, Officer Harrison did not have reasonable suspicion to believe that Mr. Harrison had anything to do with Ms. Morales committing a crime or had himself committed a crime. When he first responded, all Officer Harrison knew was that a Wal-Mart manager reported "[t]hat a female had stolen merchandise from the store and she was currently in a Subaru in the parking lot, the passenger side, and that there was a male suspect still inside the store." (1/26/15 Tr., p.8, L.23 – p.9, L.1.) Dispatch relayed that a man fitting Mr. Harrison's description had items in a cart and the manager was concerned he was going to leave without paying for them. (1/26/15 Tr., p.27, Ls.11–14.) But after Mr. Harrison left the store with grocery bags in hand, dispatch told Officer Harrison that Mr. Harrison had paid for the items.[4] (1/26/15 Tr., p.23, Ls.6–8.) Dispatch did not say that Mr. Harrison had hidden anything in his pockets or otherwise stolen anything. (1/26/15 Tr., p.27, Ls.15–25.)

[4] The State made two representations in its briefing below which are unsupported by the evidence in this case. It claimed that when Mr. Harrison was inside the store with the cart of

There was thus no reasonable suspicion to believe that Mr. Harrison had helped Ms. Morales commit a crime. As an initial matter, the district court's claim that Officer Harrison could stop Mr. Harrison if he was merely "involved" with someone who may have committed a crime is legally incorrect. (1/26/15 Tr., p.52, L.8.) As explained above, Officer Harrison needed specific, articulable facts to show that Mr. Harrison was involved in *a crime*, not simply that he may have been involved with someone who may have committed a crime. *See Morgan*, 154 Idaho at 112.

Further, the district court's finding that "Mr. Harrison and the woman had been together in the store at the place where the crime was committed" is clearly erroneous. (1/26/15 Tr., p.51, Ls.21–22.) Officer Harrison did not testify that he was told Mr. Harrison and Ms. Morales were together in the store. Instead, he testified that he was told there were two suspects, and that he assumed they were together:

> My *concerns* were that they were together because that's what had been reported to me that there was a male and a female subject. She was in the passenger seat which led me to think the driver was somewhere. *I made the assumption, I suppose, that the driver was more likely than not to be the male suspect that was given to me.*

(1/26/15 Tr., p.23, L.20 – p.24, L.1 (emphasis added).) This testimony makes clear that dispatch did not tell Officer Harrison that Mr. Harrison and Ms. Morales had been seen in the store together,[5] much less that Mr. Harrison had something to do with Ms. Morales shoplifting the

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merchandise, "he noticed the manager near the door [and] turned the cart around and returned to the interior portion of the store," and that dispatch told Officer Harrison that Mr. Harrison "had paid for some of the merchandise that had been in the shopping cart and had possibly returned some of the items." (R., p.68.) There is no evidence to support those claims.

[5] In its brief below, the State represented that "[s]tore personnel suspected that the female shoplifter must have come with another party based on their belief that by entering the passenger seat another person had been driving. They noted the suspicious behavior of a male in the store who appeared to be attempting to leave the store with a shopping cart full of merchandise without paying for it." (R., p.68.)

pants. Instead, Officer Harrison assumed as much. Such assumptions cannot provide reasonable suspicion to justify a stop.

Nor was there a shred of evidence that Mr. Harrison had himself shoplifted anything from the store. Instead, Officer Harrison testified that he stopped Mr. Harrison "based on prior experience of people that have committed theft via shoplifting into store [sic] and still paid for some merchandise." (1/26/15 Tr., p.24, Ls.1–.3.) Officer Harrison's observation that sometimes people shoplift some things while paying for others would apply to literally every person who shops at a store, and cannot amount to reasonable suspicion. Because Officer Harrison had no reasonable suspicion to support stopping and detaining Mr. Harrison, the interaction was unlawful from the outset.

B. Officer Harrison Unlawfully Frisked Mr. Harrison Without Reasonable Suspicion To Believe That Mr. Harrison Was Armed And Presently Dangerous

The United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968), recognized another exception to the warrant requirement—a pat search for weapons. "Under *Terry*, an officer may conduct a limited pat-down search, or frisk, 'of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons.'" *State v. Bishop*, 146 Idaho 804, 818 (2009) (quoting *Terry*, 392 U.S. at 16). A *Terry* frisk is justified only when, "at the moment of the frisk, the officer has reason to believe that the individual he or she is investigating is 'armed and presently dangerous to the officer or to others' and nothing in the initial stages of the encounter dispels the officer's belief." *Bishop*, 146 Idaho at 818 (quoting *Terry*, 392 U.S. at 24, 30).

The district court here explained that it was not going to decide whether the pat search was justified:

> [T]his pat-down search did not directly lead to the discovery of evidence. This pat-down search led to further questions. So the Court specifically finds that there is a not a direct nexus between the pat-down search and the ultimate discovery of evidence.
>
> Officer Harrison could just as easily have asked Mr. Harrison if he could empty his pockets or look in his pockets without the pat-down search. The pat down search does not inexorably lead to Officer Harrison asking the consent to empty the pockets.
>
> So the Court need make no conclusion about whether there was evidence to support the pat-down search because the Court finds there is not what we might call an exclusive nexus between the pat down and the ultimate search of the pockets.

(1/26/15 Tr., p.53, Ls.3–16.)

First, the district court erroneously concluded that it did not need to decide whether the pat search was justified because there was no "exclusive nexus between the pat down and the ultimate search of the pockets," and "Officer Harrison could just as easily have asked Mr. Harrison if he could empty his pockets or look in his pockets without the pat-down search." (1/26/15 Tr., p.53, Ls.7–16). To the contrary, feeling those items is what prompted Officer Harrison to ask whether he could empty Mr. Harrison's pockets. While it's true that Officer Harrison could have asked Mr. Harrison to empty his pockets without first conducting a pat down, there is no need to speculate as much because that is not what happened here. Officer Harrison asked to empty Mr. Harrison's pockets in the middle of his pat down search, after feeling several items that Officer Harrison admitted were not weapons. (1/26/15 Tr., p.31, L.25 – p.32, L.10, p.35, Ls.7–18.) Specifically, Officer Harrison asked to empty Mr. Harrison's pockets after feeling what Officer Harrison described as "remarkably small" items, and what Mr. Harrison said was change in one of his pockets. (1/26/15 Tr., p.33, L.25 – p.34, L.25, p.35, Ls.7–18; Ex. 1, 5:17:58–5:18:02.)

The facts of this case are nearly identical to those in *State v. Kerley*, 134 Idaho 870 (Ct. App. 2000). That court explained:

> [T]he officer in the instant case unlawfully frisked Kerley. During the frisk, the officer felt an object in Kerley's pants pocket and asked what the object was. Kerley answered that the object was a bolt. The officer responded that he did not believe Kerley and asked if he could remove the object from his pants pocket. Kerley consented. A review of these facts reveals that Kerley's consent flowed directly from the officer's unlawful frisk. There was no appreciable lapse of time between the frisk and Kerley's consent. We conclude that the events were irrevocably intertwined and that Kerley's consent, therefore, did not purge the taint of the unlawful frisk.

Id. at 875. Here too, Mr. Harrison's consent was irrevocably intertwined with the pat search. *See id.* Therefore, if Officer Harrison unlawfully pat searched Mr. Harrison, the unlawful pat search rendered the consent he gave during that search invalid. *See id.*; *infra*, pp.13–14. The district court erred by not deciding whether Officer Harrison unlawfully pat searched Mr. Harrison.

Second, the pat search was not justified because Officer Harrison had no reason to believe that Mr. Harrison was "'armed and presently dangerous.'" *See Bishop*, 146 Idaho at 818 (quoting *Terry*, 392 U.S. at 24, 30). Officer Harrison himself testified that he did not believe Mr. Harrison was armed and dangerous:

> Q: Now, when you told Mr. Harrison you were going to pat search him, you didn't have any information that he was violent, right?
> A: No.
> Q: You never dealt with him before, correct?
> A: Correct.
> Q: So you had no information that he was armed or dangerous; is that right?
> A: Correct.
> Q: And yet you proceeded to pat search him?
> A: Correct.

(1/26/15 Tr., p.31, Ls.4–17.)

Instead, Officer Harrison testified that, when he pulled in behind the Subaru, he had general concerns about his safety: "At that point in time I was still there alone. I couldn't tell what the female was doing. I couldn't see, you know, at all what she was doing in the vehicle

and I had limited information. And my cover officer wasn't on scene with me yet." (1/26/15 Tr., p.14, Ls.6–10.) Officer Harrison explained that he pat searched Mr. Harrison because he "was wearing a hooded sweatshirt, which fit loosely. It was hard to see what was in the center pouch of the sweatshirt or along his waistline" and "[t]here were several things bulging. I couldn't make out what they were." (1/26/15 Tr., p.15, Ls.10–15[6].)

Those circumstances did not justify a pat search. Again, Officer Harrison admitted that he had no reason to believe Mr. Harrison was armed or dangerous. (1/26/15 Tr., p.31, Ls.4–17.) That Mr. Harrison was carrying something in his pockets, like any ordinary citizen would do, could not give Officer Harrison reason to believe as much. (1/26/15 Tr., p.15, Ls.10–15.) If Officer Harrison was concerned with Ms. Morales' actions, then he pat searched the wrong person. (1/26/15 Tr., p.14, Ls.6–10.) And Sergeant Mealer arrived on scene to deal with Ms. Morales just as Officer Harrison started the pat search. (1/26/15 Tr., p.30, L.15 – p.31, L.3, p.34, Ls.11–15.) Finally, Officer Harrison was investigating a non-violent crime, Mr. Harrison complied with all of Officer Harrison's commands (Ex. 1; 1/26/15 Tr., p.14, L.12, p.16, L.21), and the parking lot was well-lit (1/26/15 Tr., p.8, Ls.10–11). Officer Harrison had no reason to believe that Mr. Harrison was armed and dangerous, and so the pat search was unlawful.

C. The Illegal Detention And Pat Search Rendered Mr. Harrison's Consent to Empty His Pockets Ineffective

"Consent to search does not expunge the taint of unlawful police activity where the events are irrevocably intertwined." *Kerley*, 134 Idaho at 874. "Relevant factors include the presence of intervening circumstances and the length of time between the consent and the frisk." *Id.* at 875. Therefore, "consent to search, given during an illegal detention, is tainted by the

[6] They turned out to be a wallet and a cell phone. (1/26/15 Tr., p.32, Ls.17–20.)

illegality and, thus, is ineffective." *State v. Zavala*, 134 Idaho 532, 535 (Ct. App. 2000) (citing *Royer*, 460 U.S. at 507–08). Similarly, consent is irrevocably intertwined with an illegal pat search, making it invalid, when an officer asks to empty a person's pockets during an illegal pat search. *Kerley*, 134 Idaho at 875.

Mr. Harrison's consent to empty his pockets was ineffective. That consent came during an illegal detention and an illegal pat search. As explained above, Officer Harrison asked to empty Mr. Harrison's pockets in the middle of the pat search after a feeling small item in Mr. Harrison's pocket. (*See supra*, pp.10–11.) There were no intervening circumstances or any lapse of time between the illegal conduct and the consent—the two occurred simultaneously. *See Kerley*, 134 Idaho at 875. Because Mr. Harrison was illegally detained and pat searched, his consent was tainted by that illegality and was therefore ineffective.

D. Even if Officer Harrison Lawfully Detained And Pat Searched Mr. Harrison, His Consent Was Involuntary

"Where there is coercion there cannot be consent." *Bumper v. N. Carolina*, 391 U.S. 543, 550 (1968). "For no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a mere pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Schneckloth*, 412 U.S. at 228. Mere acquiescence does not constitute knowing, intelligent, and voluntary consent. *Bumper*, 391 U.S. at 548–49; *State v. Jaborra*, 143 Idaho 94, 98 (Ct. App. 2006). Whether consent was the product of coercion is a factual determination. *Schneckloth*, 412 U.S. at 229. "The state has a heavy burden to prove that consent was given freely and voluntarily." *Zavala*, 134 Idaho at 536.

To determine whether a defendant voluntarily gave consent, the court must assess "the totality of all the surrounding circumstances—both the characteristics of the accused and the

details of the interrogation." *Schneckloth*, 412 U.S. at 226; *see also State v. Garcia*, 143 Idaho 774, 778 (Ct. App. 2006). Relevant factors include, but are not limited to, whether the defendant knew he could deny consent; the location, conditions, and time at which the consent was given; whether the defendant was free to leave; the number of officers involved; and the lack of any advice to the defendant regarding his constitutional rights. *Garcia*, 143 Idaho at 778; *see also Schneckloth*, 412 U.S. at 226 (considering "(1) whether Miranda warnings were given; (2) the youth of the accused; (3) the accused's level of education or low intelligence; (4) the length of the detention; (5) the repeated and prolonged nature of the questioning; and (6) deprivation of food or sleep."). "Because each factual situation surrounding consent to a search is unique, [the Court] may also take into account any other factors that [it] deem[s] relevant." *Liberal v. Estrada*, 632 F.3d 1064, 1082 (9th Cir. 2011).

The district court here found the consent was voluntary:

> The Court is certainly aware of the State versus Jaborra factors to consider at 143 Idaho 94, a 2006 Court of Appeals case. Those are not exhaustive factors but those factors are instructive to the court and they include an analysis of whether there was an overwhelming number of officers at the scene; the Court finds there was not. There were two officers there to handle two potential suspects or even one suspect and one involved person or person with information.
>
> The Court considers the location and the conditions. This was in a public area, in a parking lot of a normally busy retail center, but it was at a time of the morning when it was not a lot of foot traffic or car traffic there [sic]. Somewhat remote location, but not as if it was out of the view of public or off in some secluded place . . . . It wasn't an inherently coercive location or condition. It was a lighted parking lot. . . . There were people outside spoke [sic] it was done in a public setting.
>
> Officer Harrison did not take and withhold any identification. . . . He clearly advised him "You are not under arrest. You are being detained until we can figure out what happened in this suspected shoplifting." . . . .
>
> He was not—Mr. Harrison was not advised of his right to refuse consent. The case law is clear that police need not advise that. And that factor alone does not make consent an invalid or involuntary consent.
>
> The Court also makes the finding that it observed both in the actions that the Court saw in Exhibit 1 and in the tone of voice used by Officer Harrison in

> Exhibit 1, that it was a reasonable tone of voice. There were reasonable actions. . . .
>
> He was polite. Assertive as he needed to be. And that his demeanor was one that did not overbear the will of Mr. Harrison to voluntarily or freely give that consent.

(1/26/15 Tr., p.54, L.6 – p.55, L.25.)

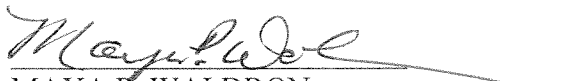
Contrary to the district court's conclusion, Mr. Harrison did not voluntarily consent to Officer Harrison's request to empty his pockets because the circumstances of the interaction were such that a reasonable person would not feel free to refuse consent. As the dash camera video shows, Mr. Harrison's consent came only after Officer Harrison said "excuse me sir, step right over here for me," ordered him three times to "set your stuff down for me," then "step right over here for me," "turn around for me" and "I'm going to make sure you don't have any weapons." (Ex. 1, 5:16:32–5:16:52; *see also* 1/26/15 Tr., p.30, Ls.1–19.) Officer Harrison then commanded Mr. Harrison: "Spread your feet," (three times) "relax," and "don't talk to her, talk to me," before handcuffing Mr. Harrison and saying "you're not under arrest, you're just being detained." (Ex. 1, 5:16:53–5:17:29.) Officer Harrison then asked "what's in your pocket here" to which Mr. Harrison responded "just change and stuff like that." (Ex. 1, 5:17:58–5:18:02.) Officer Harrison asked "k, you mind if I check, make sure there's no stolen merchandise or anything?" and Mr. Harrison said "yeah, man." (Ex. 1, 5:18:02–5:18:09.)

A reasonable person in those circumstances would not have felt free to refuse consent. Officer Harrison had been ordering Mr. Harrison around, Mr. Harrison was not free to leave, Officer Harrison had detained Mr. Harrison in handcuffs, and Officer Harrison did not inform Mr. Harrison that he could refuse to consent. Mr. Harrison's consent was not voluntary and the fruits of that search must be suppressed.

CONCLUSION

Mr. Harrison respectfully requests that this Court vacate his conviction, reverse the order denying his motion to suppress, and remand to the district court for further proceedings.

DATED this 5th day of January, 2016.



MAYA P. WALDRON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of January, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

MICHAEL SEAN HARRISON
INMATE #65199
CAPP
15505 S PLEASANT VALLEY ROAD
KUNA ID 83634

LANSING L HAYNES
DISTRICT COURT JUDGE
E-MAILED BRIEF

MEGAN E MARSHALL
KOOTENAI COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand delivered to Attorney General's mailbox at Supreme Court.

EVAN A. SMITH
Administrative Assistant

MPW/eas